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83-1789

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

THOMAS EUGENE MADDOX,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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64 pp

QUESTIONS PRESENTED

I. Does the Georgia statutory scheme, which prohibits a person from selling freshwater crappie cultivated in private ponds, deprive him of his private property without due process of law in violation of the fifth and fourteenth amendments to the United States Constitution?

II. Is the Georgia statutory scheme, which makes it unlawful to sell privately cultivated fish which are defined as "wildlife" vague and void for overbreadth?

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OPINIONS BELOW

The judgment of the State Court of Toombs County is reported as State of Georgia v. Thomas Eugene Maddox, No. 39475 (October 26, 1983), and is set out in the Appendix at A-1 to A-2. The decision of the Supreme Court of Georgia is styled as Maddox v. State, No. 40639 (February 17, 1984), and is set out in the Appendix at A-3 to A-11.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on February 17, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) and (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests upon the fifth and fourteenth amendments to the United States Constitution. The lower court conviction rested upon interpretation of the Georgia Game and Fish Code. Ga. Code Ann. §§ 27-1-1 et seq. Specifically, the conviction involved construction of Ga. Code Ann. §§ 27-1-2(36) & (77), 27-1-3, 27-4-30, 27-4-74 (1980).

STATEMENT OF THE CASE

Thomas Eugene Maddox--the owner of a wholesale and retail fish market--is a farmer who has several farms with private ponds located on the property. He has built these ponds specifically for the purpose of raising fish and using the water from the ponds to irrigate his crops. Mr. Maddox has been cultivating and selling fish from his private ponds for a number of years.

In April 1982, Mr. Maddox sold ten pounds of fresh-water crappie to an officer from the Georgia Game and Fish Commission. Mr. Maddox was subsequently charged with selling game fish: a misdemeanor under Ga. Code Ann. § 27-4-74 (1982). On October 26, 1982, in the state court of Toombs County, Mr. Maddox was convicted of the offense and fined $200. (A-1 to A-2) He appealed his

conviction to the Supreme Court of Georgia.

On appeal, Mr. Maddox alleged that the statutory scheme under which he was prosecuted was unconstitutional and that his conduct was not proscribed by the statute. Specifically, he argued that the prosecution deprived him of his private property without due process of law in violation of article 1 of the Georgia Constitution and the fourteenth amendment to the United States Constitution. Moreover, he asserted that the fish he sold were not "wildlife" in that they were cultivated in private fish ponds as part of his retail fish business.

The Supreme Court of Georgia affirmed Mr. Maddox's conviction. In an opinion filed by Justice Smith, the court found that Mr. Maddox was not deprived of due process of law and that the statutory scheme was

constitutional. (A-3 to A-8) Justice Weltner filed a dissenting opinion. (A-9 to A-11) The Georgia Supreme Court denied Mr. Maddox's petition for rehearing on March 6, 1984.

REASONS FOR GRANTING CERTIORARI

The Georgia statutory scheme has permitted the deprivation of Mr. Maddox's private property without due process of law. Moreover, the statutory scheme is vague and overbroad in that it allows selective and arbitrary enforcement and does not put a citizen on reasonable notice of what conduct is prohibited. These issues raise significant questions involving the fifth and fourteenth amendments to the United States Constitution.

I. THE GEORGIA STATUTORY SCHEME, WHICH PROHIBITS A PERSON FROM SELLING FRESHWATER CRAPPIE CULTIVATED IN PRIVATE PONDS, DEPRIVES HIM OF HIS PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The right to fish in private waters is a property right which is maintained exclusively by the owner. McCready v. Virginia, 94 U.S. 391 (1876); Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936); State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); Wickouski v. Swift, 203 Va. 467, 124 S.E.2d 892 (1962). The owner is said to be the absolute owner of the uncaught fish. Territory v. Hoy Chong, 21 Hawaii 39 (1912); State v. Roberts, 59 N.H. 256 (1879). This right arises as an incident to the ownership of the soil. City of Birmingham v. Lake, 243 Ala. 367, 10 So. 2d

24 (1942); Rice Hope Plantation v. South Carolina Public Service Authority, 216 S.C. 500, 59 S.E.2d 132 (1950). It is an interest in real estate akin to an incorporeal hereditament, State v. Mallory, 73 Ark. 236, 83 S.W. 955 (1904), and is subject to all the rules of assignment such as inheritance by heirs. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930).

The right is constitutionally protected from confiscatory legislation, Holyoke Water-Power Co. v. Lyman, 82 U.S. (15 Wall.) 500 (1872); Allen v. McClellan, 75 N.M. 400, 405 P.2d 405 (1965), and may not be dismissed as a mere privilege or right of citizenship. McCready v. Virginia, supra; State v. Leavitt, supra. Indeed, many jurisdictions recognize that the state, acting pursuant to its police power, has no interest in regu-

lating purely private fishing waters which are unconnected to public waters. See Milton v. State, 144 Ark. 1, 221 S.W. 461 (1920); People v. Conrad, 125 Mich. 1, 83 N.W. 1012 (1900); State v. Roberts, supra; State v. Biggs, 12 N.J. Misc. 833, 175 A. 362, aff'd, 117 N.J.L. 240, 187 A. 199 (1934); Washburn v. State, 90 Okla. Crim. 306, 213 P.2d 870 (1950); State v. Lipinske, 212 Wis. 421, 349 N.W. 289 (1933). In Washburn v. State, supra, the court made the following observation regarding the private right to fish on private lands without state interference:

> "Plaintiff's lakes are entirely enclosed by its own land and are not located on a stream where fish may freely pass to and from other waters. In such case the fish, while yet uncaught, it is said constitute the private property of the owner of the lake; that the public is entirely without interest in the lake or in the fish, and that the Legislature cannot touch the same under the guise of police power.

213 P.2d at 872 (emphasis added) (quoting Newman v. Ardmore Rod & Gun Club, 190 Okla. 470, 125 P.2d 191, 192 (1942)).

The private right is not unqualified, however. The state is empowered to regulate the taking of game pursuant to established public interests and subject to constitutional restrictions. Toomer v. Witsell, 334 U.S. 385 (1948); New York v. Becker, 241 U.S. 556 (1916). The power to regulate may be based upon the theory that the fish in the waters of the state belong to the people in their sovereign capacity. Lawton v. Steele, 152 U.S. 133 (1893). Indeed, this doctrine underlies the state's claim in the instant case. See Question II, infra. This claim most often arises in those instances where the state is said to have an interest in the fish where private lakes or ponds are con-

nected with other waters of the state. The "overflow" negates any private interest in the individual fish. People v. Bridges, 142 Ill. 30, 31 N.E. 115 (1892); People v. Horling, 137 Mich. 406, 100 N.W. 691 (1904). The other justification for state regulation of private fishing rights stems from the police power. In general, the state is permitted to encroach upon private property interests in matters regarding protection and conservation of fish and game. For example, the state has an interest in protecting game and fish from extermination or severe depletion. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); State v. Harrub, 95 Ala. 176, 10 So. 752 (1892). The state also has an interest in preventing the taking of game by cruel and malevolent means. Commonwealth v. Higgins, 277 Mass. 191, 178

N.E. 536 (1931). Neither of these conservation interests were advanced in the instant case. Moreover, neither justification seems applicable in the instant case. Under the statutory scheme, an owner of a pond may fish "at any time and in any manner without a fishing license." Ga. Code Ann. § 27-4-30 (1982). Clearly, the challenged state regulation is unrelated to protecting the fish in private ponds from depletion or inhumane fishing methods.

Therefore, the deprivation of the private property right in the instant case hinges upon the fiction that the state owns all the fish in the State of Georgia. Indeed, this theory comports with Ga. Code Ann. § 27-1-3(a) (1982), which provides in pertinent part:

> The ownership of, jurisdiction over, and control of all wildlife, as defined in this title, are declared to

> be in the State of Georgia, in its sovereign capacity, to be controlled, regulated, and disposed of in accordance with this title. All wildlife of the State of Georgia are declared to be within the custody of the department for purposes of management and regulation in accordance with this title.

The scope of the fiction of "state ownership," however, is not extensive. Indeed, it has been observed:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

Toomer v. Witsell, supra, 334 U.S. at 402 (footnote omitted). As elaborated in Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284-285 (1977),

"[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U.S. 416, 434, 40 S.Ct. 382, 384, 64 L.Ed. 641 (1920). A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. Ibid.; Geer v. Connecticut, 161 U.S. 519, 539-540, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Toomer v. Witsell, 334 U.S., at 402, 68 S.Ct., at 1165; see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421, 68 S.Ct. 1138, 1143, 92 L.Ed. 1478 (1948). Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. As we have demonstrated above, Virginia has failed to do so here.

Even conceding that the State of

Georgia "owns" all the wildlife in the state, it is clear that the privately owned fish of Mr. Maddox cannot fall within the ambit of the term "wildlife." Mr. Maddox was convicted for violating the Georgia Game and Fish Code even though the fish he raised and sold were taken from a private pond located completely on his private property. The cultivated fish were unable to move about through free-flowing waters, and in no ordinary sense of the word could be considered as "wildlife." Indeed, it is clear from an analysis of pertinent case law that domestically raised animals cannot constitute wildlife within the context of a criminal statute prohibiting the "taking" of wildlife. See State v. Dolan, 11 Idaho 256, 81 P. 504 (1905) (a person may establish a private pond to propagate fish in water on premises of his

own and may sell them directly to the consumer); accord United States v. Conners, 609 F.2d 269 (10th Cir. 1979) (distinguishing between captive-reared ducks and "wild" ducks); Crosby v. State, 121 Ga. 198, 48 S.E. 913 (1904) (in prosecution under game law for selling a wild deer, a prima facie case for the state is not made out by showing merely that the accused had in his possession and sold the meat of a deer; rather the state should affirmatively show that the deer was "wild"); State v. Murray, 5 Ohio Misc. 97, 210 N.E.2d 308 (1965) (domestic trained bear not a "wild" bear); Schultz v. Morgan Sash & Door Co., 344 P.2d 253 (Okla. 1959) (tame herd of domestically raised deer are privately owned and not subject to regulation by wildlife conservation authorities under theory that state owns all wildlife);

Sprague-Dawley, Inc. v. Moore, 37 Wis. 2d 689, 155 N.W.2d 579 (1968) (privately cultivated white rats are not "wildlife"); Wyoming Game & Fish Commission v. Fordyce, 530 P.2d 1198 (Wyo. 1972) (regulations inapplicable to privately possessed elk); see also Ballentine's Law Dictionary (definition of wild animal): "an animal 'Ferae Naturae'; an animal wild by nature; an animal 'Ferae Naturae'; such as fish in public waters. Hegeman (NY) 14 Wend 42, 45" (emphasis added).

Mr. Maddox contends that if all fish in the State of Georgia are deemed to be "wildlife," then the aforesaid Code section has deprived him of his private property without due process of law in violation of the Constitution of the United States.

In Gray v. Georgia Real Estate Commission, 209 Ga. 301, 71 S.E.2d 645 (1952), the court

stated that the right to sell one's own property for a lawful use is within itself properly protected by the state and is beyond the reach of legislative impairment. The court further stated that the Constitution forbids the destruction, taking, or impairing of private property by any state bureau under any pretended legislative powers. In that case, the Real Estate Commission was attempting to require the owners of certain land to procure a license before selling the same, and the court held that the statute authorizing the real estate commission to regulate private property in that manner was violative of the due process clause of the Constitution.

If the Code section herein was meant to prevent all persons whomsoever from selling any game fish--and nowhere in the Code section does the law exempt the owner of

private property from its provisions--then the enforcement of said provisions would deprive the petitioner of his property without due process of law. As stated in Gray, the Constitution would forbid the destruction, taking or impairing of private property by any state bureau under any pretended legislative powers. The unshackled right to sell one's own property for a lawful sum is within itself properly protected by the Constitution and is beyond the reach of legislative impairment.

Since the aforesaid Code section does not exempt the owner of private property from its provisions, Mr. Maddox contends that it is in direct contradiction to the letter and spirit of the aforesaid constitutional provision.

Here the enforcement of the provision

does not in any way affect the public interest as it relates to the owner of private property.

Due process requires that the government abide by basic principles of fairness when dispensing, or revoking, a privilege. Hester v. Craven, 322 F. Supp. 1256 (C.D. Cal. 1970). In general, a statute is deemed consistent with due process if it meets the "rational basis" test. Richardson v. Belcher, 404 U.S. 78 (1971); United States v. Lieb, 462 F.2d 1161 (Emer. Ct. App. 1972). It is clear from the foregoing, however, that the State of Georgia has not established a "rational basis" for depriving Mr. Maddox of the right to privately cultivate and dispense his own fish. As previously observed, conservation and preservation of the species "crappie" cannot constitute such a basis

since a person who owns a fish-yielding private pond can take and dispense with an unlimited quantity of fish. See Ga. Code Ann. § 27-4-30 (1982), which provides that an owner of a pond may fish "at any time and in any manner without a fishing license." Id. Clearly, the challenged state regulation is unrelated to protecting the fish in private ponds from depletion or inhumane fishing methods.

Moreover, the statute cannot be justified pursuant to the archaic notion that the state owns all wildlife within the state. First, it is not clear that this conception of ownership has any vitality outside the context of a state's interest in conservation. Toomer v. Witsell, supra, Douglas v. Seacoast Products, Inc., supra. Second, the petitioner submits that fish propagated in a

private pond, wholly enclosed within private property, are not "wildlife" subject to regulation by the state.

II. THE GEORGIA STATUTORY SCHEME, WHICH MAKES IT UNLAWFUL TO SELL PRIVATELY CULTIVATED FISH WHICH ARE DEFINED AS "WILDLIFE," IS VAGUE AND VOID FOR OVERBREADTH.

It is settled that a criminal statute which "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," United States v. Harriss, 347 U.S. 612, 617 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972), is void for vagueness. See generally Colautti v. Franklin, 439 U.S. 379, 390 (1979); Grayned v. City of Rockford,

408 U.S. 104, 108-09 (1972). Analysis of the instant statutory scheme reveals that it both fails to give a person fair notice and encourages selective enforcement.

The Georgia Supreme Court made the following observation regarding the instant scheme:

> OCGA § 27-1-3 provides that ownership of, jurisdiction over, and control of all wildlife, as defined in that title, are declared to be in the state in its sovereign capacity. "Wildlife" is defined in OCGA § 27-1-2 to include fish. OCGA § 27-1-2(36)(C) specifically defines "game fish" to include crappie. OCGA § 27-4-74 clearly states that game fish may not lawfully be bought or sold. There is no exception made for crappie cultivated in private ponds. Thus, there is no merit in this enumeration.

(A-4)

Although this analysis appears sound, closer scrutiny reveals that the statutory scheme gives the state unfettered discretion

to declare all animal life "wild" and therefore subject to the instant regulations and restrictions.

The Game and Fish Code defines "wildlife" as "any vertebrate or invertebrate animal life indigenous to this state or any species introduced or specified by the board and includes mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks or any part thereof." Ga. Code Ann. § 27-1-2(77) (1980). When analyzed in connection with Ga. Code Ann. § 27-1-3, however, it is apparent that the state assumes ownership, jurisdiction, and control of all animals which fit the foregoing definition of "wildlife." This expansive definition allows the state to acquire ownership, for purposes of interpreting criminal statutes, over nearly every conceivable animal life-form--

including homo sapiens. As aptly observed by Justice Weltner in his dissenting opinion, this scheme not only exceeds any reasonable interpretation of the word "wildlife" but also raises grave constitutional implications regarding the right to due process and state deprivation of property.

> Thus it is seen that the basis for the prosecution of Maddox consists of two sentences--one declaring all animal life in Georgia to be "wildlife," and the second declaring all such "wildlife" to be the property of the State.
>
> The constitutional implications of such a declaration are astonishing, striking at the center of our system of the private ownership of property, and permitting expropriation by legislative fiat, without compensation. From this fiat pend manifold criminal provisions, e.g., OCGA § 27-1-28(a), making it a crime to ". . . take, possess, or transport any nongame species of wildlife. . . ." Bearing in mind its all-inclusive definition of "wildlife," this statute makes it a crime to transport a sick cat to the veterinarian; or to take a goldfish to school for "Show and Tell;" or to haul a blue-tick hound in a pickup truck.

(A-10 to A-11)

Plainly, the purported assumption of control, ownership, and jurisdiction of all vertebrate and invertebrate animal life-forms exceeds any reasonable expectations. It is exceedingly unlikely that a person could be put on notice that the state is employing this broad definition of "wildlife." See Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966) (statute that contains a criminal sanction that is so unclear and indefinite as to make it uncertain in meaning does not meet due process test contained in fourteenth amendment to Federal Constitution); Music Stop, Inc. v. City of Ferndale, 488 F. Supp. 390 (E.D. Mich. 1980) (criminal statute that does not give fair notice to person of ordinary intelligence of what conduct was proscribed is unconstitutional as violative

of due process); see also Cohen v. Katsaris, 530 F. Supp. 1092 (N.D. Fla. 1982) (criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process).

Although cases paralleling the instant situation are rare, it is clear that the foregoing vagueness standards apply to fish and game statutes which provide criminal penalties. State v. Martin, 7 N.C. App. 532, 173 S.E.2d 49 (1970). In Martin, the defendant was convicted of "snagging" fish in violation of state law. "Snagging" fish is a means of catching fish by yanking the line through the water so as to hook a fish in the body rather than in the mouth. 173 S.E.2d at 48. The court observed, however:

> A literal application of the dictionary definition cited by the State would make it an unlawful act if a

> person, fishing with a baited hook in a lawful manner, had the good fortune of hooking a fish in the tail fin, rather than in the mouth, as he raised his hook from the water. (We have heard stranger "fish tales"). . . .
>
> . . . .
>
> The Commission has undoubtedly sought to prohibit by regulation and in the public interest a reprehensible method of taking or attempting to take fish. This they have the authority to do, but only if they use language which specifically defines and describes the act or equipment they seek to prohibit. Perhaps, as the State argues, fishermen generally understand the language of the regulation as written. But it is also necessary that judges understand it, for their duty is to apply the regulation. And all judges are not fishermen. Criminal provisions must be strictly construed against the State and liberally construed in favor of a defendant with all conflicts resolved in favor of the defendant. State v. Pinyatello, 272 N.C. 312, 158 S.E.2d 596; State v. Scoggin, 236 N.C. 1, 72 S.E.2d 97. In our opinion the warrant was properly quashed and the judgment of the trial court is affirmed.

Id. It is submitted that the Legislature in

the instant case has similarly sought to effect an admirable outcome: the preservation of wildlife. The scheme, however, carries criminal sanctions and must be interpreted in favor of the alleged offender. Moreover, the scheme greatly exceeds any reasonably foreseeable application in that the term "wildlife" purportedly includes dogs, cats, humans, goldfish, fish cultivated in private ponds, and all other conceivable animals--vertebrates and invertebrates alike.

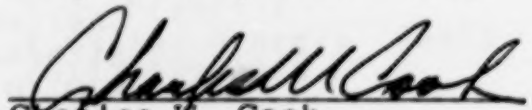
For these reasons, the conviction of Mr. Maddox must be overturned.

CONCLUSION

The instant Georgia statutory scheme violates the precepts of due process, as guaranteed by the fifth and fourteenth amendments to the United States Constitution. The statute is vague and void for overbreadth and permits the deprivation of private property without due process of law.

Therefore, the petitioner submits that this appeal brings before the Court substantial and important questions which require plenary consideration, with briefs on the merits and oral argument. The petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,



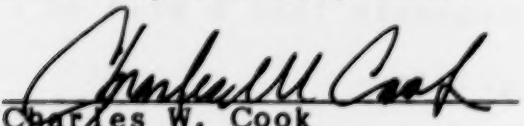
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CERTIFICATE OF SERVICE

I hereby certify that, this the 1st day of May, 1984, three (3) copies of the foregoing Petition for Writ of Certiorari filed on behalf of Petitioner Thomas Eugene Maddox were duly served upon Respondent State of Georgia by placing same in the United States Mail first class postage prepaid, certified return receipt requested, to

Malcolm F. Bryant, Jr.
Special Prosecutor for the
State Court Solicitor
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

THOMAS EUGENE MADDOX,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

APPENDIX

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IN THE STATE COURT OF TOOMBS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
PLAINTIFF	)	
	)	
VS.	)	CASE NO. 39475
	)	
THOMAS EUGENE MADDOX,	)	
	)	
DEFENDANT	)	

JUDGMENT OF THE COURT

The Court finds that on or about April 13, 1982, the Defendant, Thomas Eugene Maddox, did arrange and authorize the sale of ten pounds of fresh water crappie from his business known as Maddox Fish House, located in Lyons, Toombs County, Georgia, and that the fish were obtained by the Defendant from one of his five, private ponds, and were sold at a time in which the Defendant had no permit from the Department of Natural Resources to sell or possess the fish which were sold to S.A. Wood, an officer of the State Game and Fish Commission in violation of Georgia

Laws, as specifically set out in Ga. Code Ann., §45-808(c), and Ga. Code Ann., §45-205.

The Court further finds that the Defendant was not deprived of his property without due process of law in violation of Article I, Section I, Paragraph I of the Constitution of the State of Georgia, and of the Fourteenth Amendment to the United States Constitution. Defendant is hereby fined the sum of $200.00, payable within ninety Days. [Sentence added by hand.]

This 26 day of October, 1983.

/s/_____

Don P. Carpenter, Judge

In the Supreme Court of Georgia

Decided: FEB 17, 1984

40639. MADDOX v. THE STATE

SMITH, Justice.

In April 1982, appellant Thomas E. Maddox sold ten pounds of fresh water crappie to an officer of the Georgia Game and Fish Commission. As a result of this sale Maddox was charged with the offense of selling game fish, a misdemeanor. OCGA § 27-4-74. In October he was adjudged guilty of this offense and fined $200. Now he brings this appeal, contending that the statute under which he was prosecuted is unconstitutional in that he is deprived of his property without due process of law. We affirm.

1. In his first enumeration Maddox contends that the court erred in finding that he had violated OCGA § 27-4-74, which states, in part: "[I]t shall be unlawful for any person

to sell or purchase any game fish." Maddox submits that the fish in question are domesticated and are not wildlife as defined in OCGA § 27-1-2(77), in that they are held in private ponds, never reach public waters, and thus are beyond the reach of state regulation.

OCGA § 27-1-3 provides that ownership of, jurisdiction over, and control of all wildlife, as defined in that title, are declared to be in the state in its sovereign capacity. "Wildlife" is defined in OCGA § 27-1-2 to include fish. OCGA § 27-1-2(36)(C) specifically defines "game fish" to include crappie. OCGA § 27-4-74 clearly states that game fish may not lawfully be bought or sold. There is no exception made for crappie cultivated in private ponds. Thus, there is no merit in this enumeration.

2. In his second enumeration appellant

challenges the constitutionality of the law creating the offense of which he was convicted, contending that it deprives him of his property without due process of law, and citing the 14th Amendment of the Constitution of the United States and Art. 1, § 1, para. 1 of the Georgia Constitution of 1983.

OCGA § 27-4-74 provides that the owner of a pond may obtain a permit allowing game fish to be taken from the pond for purchase or sale. The permit may be issued to the owner only once annually and shall limit the time for taking fish from the pond to 15 days unless an extension is granted. The statute goes on to enumerate certain packaging and labeling requirements for the fish taken under such a permit.

We note in the beginning that the challenged statute does not deprive the appellant of the right to take game fish from

his own pond or to possess them, but only prohibits their purchase or sale. He may retain them for his own use, or he may allow members of his family and his tenants to do the same. OCGA § 27-4-30.

OCGA § 27-1-3 provides that the state, in its sovereign capacity, own, controls, and may regulate all wildlife. It has long been the rule that the state may exercise its police power to enforce and exercise its sovereign capacity over wildlife in order to preserve and protect it for the public good. Allen v. State, 11 Ga. App. 75 (74 S.E. 706) (1912). The state's interest in such matters and its authority to regulate them is one of the oldest continuously recognized doctrines of law in our system (see Geer v. Connecticut, 161 U.S. 519 (16 SC 600, 40 LE 794) (1895)), and it is uniformly adhered to throughout this country. See 35 Am. Jur. 2d,

Fish and Game § 29, et seq. Since this right is inherent in the state in its sovereign capacity, there is no taking from an individual or infringement of his constitutional rights when the state exercises its power to regulate and preserve wildlife. While it is true that ownership of these fish is a property right, it is not an absolute and unqualified right, and is bounded by the limitation that it must always yield to the state's power to regulate and preserve for the public good. It is our view that the regulatory statute complained of here functions to protect the stocks of fish swimming freely in waters of this state and as such is a proper exercise of the police power. To rule otherwise would create unmanageable problems of enforcement for officials charged with direct responsibility for wildlife conservation. Therefore, we find that the

challenged statute, OCGA § 27-4-74, is constitutional and that there is no merit in this enumeration.

Judgment affirmed. All the Justices concur, except Weltner, J., who dissents.

40639. MADDOX v. THE STATE

WELTNER, Justice, dissenting.

Maddox was convicted for the violation of a provision of the "Game and Fish Code," OCGA § 27-1-1 et seq., even though the fish which he sold belonged to him and were taken from a private pond located completely on his property, were unable to move about through free-flowing waters, and in no ordinary sense of the word could be considered as "wildlife."

The Game and Fish Code, however, defines "wildlife" as follows: "'Wildlife' means any vertebrate or invertebrate animal life indigenous to this state or any species introduced or specified by the board and includes mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks or any part thereof." OCGA § 27-1-2 (77).

Having drawn a definition which includes, perhaps, human beings, the Code

goes on to declare, in one sentence, that all wildlife is the property of the State of Georgia. "The ownership of, jurisdiction over, and control of all wildlife, as defined in this title, are declared to be in the State of Georgia, in its sovereign capacity, to be controlled, regulated, and disposed of in accordance with this title."

* * *

Thus it is seen that the basis for the prosecution of Maddox consists of two sentences-- one declaring all animal life in Georgia to be "wildlife," and the second declaring all such "wildlife" to be the property of the State.

The constitutional implications of such a declaration are astonishing, striking at the center of our system of the private ownership of property, and permitting expropriation by legislative fiat, without

compensation. From this fiat pend manifold criminal provisions, e.g., OCGA § 27-1-28(a), making it a crime to ". . . take, possess, or transport any nongame species of wildlife. . . ." Bearing in mind its all-inclusive definition of "wildlife," this statute makes it a crime to transport a sick cat to the veterinarian; or to take a goldfish to school for "Show and Tell;" or to haul a blue-tick hound in a pickup truck.

* * *

While all of these considerations were not raised in this appeal, the scope of the term "wildlife" was. I cannot agree that Maddox was convicted lawfully.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abrdige the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the

Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State

legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the

validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Ga. Code Ann. § 27-1-2(36)

"Game fish" means the following fish:

(C) Crappie:
(i) White crappie; and
(ii) Black crappie.

Ga. Code Ann. § 27-1-2(77)

"Wildlife" means any vertebrate or invertebrate animal life indigenous to this state or any species introduced or specified by the board and includes mammals, birds, fish, amphibians, reptiles, crustaceans, and mollusks or any part thereof.

Ga. Code Ann. § 27-1-3(a)(b)

(a) The ownership of, jurisdiction over, and control of all wildlife, as defined in this title, are declared to be in the State of Georgia, in its sovereign capacity, to be controlled, regulated, and disposed of in accordance with this title. All wildlife of

the State of Georgia are declared to be within the custody of the department for purposes of management and regulation in accordance with this title. However, the State of Georgia, the department, and the board shall be immune from suit and shall not be liable for any damage to life, person, or property caused directly or indirectly by any wildlife.

(b) To hunt, trap, or fish, as defined in this title, or to possess or transport wildlife is declared to be a privilege to be exercised only in accordance with the laws granting such privilege. Every person exercising this privilege does so subject to the right of the state to regulate hunting, trapping and fishing; and it shall be unlawful for any person participating in the privileges of hunting, trapping, fishing, possessing, or transporting wildlife to

refuse to permit authorized employees of the department to inspect and count such wildlife to ascertain whether the requirements of the wildlife laws and regulations are being faithfully complied with. Any person who hunts, traps, fishes, possesses, or transports wildlife in violation of the wildlife laws and regulations violates the conditions under which this privilege is extended; and any wildlife then on his person or within his immediate possession are deemed to be wildlife possessed in violation of the law and are subject to seizure by the department pursuant to Code Section 27-1-21.

Ga. Code Ann. § 27-4-30

The owner of a private pond, his family, or tenants with the owner's consent shall be permitted to fish within the bounds of the pond at any time and in any manner

without a fishing license; provided, however, that all other persons shall be required to obtain fishing licenses therefor as provided in this title.

Ga. Code Ann. § 27-4-74(c)

It shall be lawful for any person to sell or purchase game fish from a pond when the owner of the pond has obtained a valid permit from the department and the permit is displayed in a prominent place at the pond and the person shall have complied with all the requirements of this Code section and any regulations promulgated pursuant to this Code section. The permit may be issued to the owner only once annually and shall limit the time for taking fish from the pond to 15 days unless an extension is granted by the department. However, no person shall sell, purchase, or possess any game fish taken from

such a pond unless the fish are packaged and labeled with the pond permit number and the number and pounds of each species of fish contained therein. The fish shall remain so packaged until processed for consumption or released into another body of water.